

87-2134 ①

Supreme Court, U.S.

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CLERK

NO:

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

PETER SCHNECKENBURGER, III
Petitioner

VS

THE LOUISIANA COMMISSION ON ETHICS
FOR PUBLIC EMPLOYEES
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT, STATE OF LOUISIANA

SAMUEL S. DALTON
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Jefferson, Louisiana 70121
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105 PPH



QUESTION PRESENTED

May a State, in the face of the 5th and 14th Amendments to the Constitution of the United States, the Due Process Clauses and Equal protection clauses thereof, and Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L. ED. 2d 629 (1967) create a Statutory Scheme, in the name of Ethics for Public Employees, which when enforced upon Petitioner, a Public Employee, results in the complete abolition of Petitioner's constitutional right to dispose of private property when there is an absence of any wrongdoing, whatsoever, on the part of petitioner and the property is not contraband?

LIST OF INTERESTED PERSONS

The only persons and entities having an interest in the outcome of this matter are the Petitioner, his family and the State of Louisiana through its Commission on Ethics for Public Employees.

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IN THE
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OCTOBER TERM, 1987

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VS

THE LOUISIANA COMMISSION ON ETHICS
FOR PUBLIC EMPLOYEES
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT, STATE OF LOUISIANA

The petition of Peter Schneckenburger, III, respectfully prays that a Writ of Certiorari issue, to review the judgment and the opinion of the Louisiana Supreme Court entered in these proceedings on January 18, 1988 and denial of petitioner's timely motion for rehearing, entered on March 31, 1988.

OPINIONS BELOW

The opinion of the Louisiana Supreme Court is dated January 18, 1988, styled "In Re Peter Schneckenburger III" and reported in 518 So2d 497, denial of rehearing on the 31st day of March, 1988. Said opinion is appended hereto as Appendix "A", pages A-1 thru A-32 thereof. The opinion of the Louisiana 1st Cir. Court of Appeal is styled the same and is reported in 509 So2d 790. Said opinion is appended hereto as Appendix "B", pages A-33 thru A-50 thereof. The Decision of the Louisiana Commission on Ethics for Public Employees dated February 21, 1988 and is numbered Opinion No. 85-101 and styled "Re: Investigation of Alleged Violations of the Code by Peter Schneckenburger, III". Said decision is appended hereto as Appendix "C", pages A-51 thru A-67.

JURISDICTION

The Judgment of the Louisiana Supreme Court was entered on January 18, 1988 and became final on March 31, 1988 with the denial of a rehearing on that date (See In Re Schneckenburger III, 518 So2d 497 [La.1988], Appendix "A", pages A-1 to A-32 hereof). This petition for Certiorari to the Supreme Court, State of Louisiana is filed within 90 days of the denial of rehearing below. This Court's Jurisdiction is invoked under 28 U.S.C. 1257(3) and Keyishian v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed. 2d 629 (1967) and United States v. Chicago, M., St. P. & P. R. Co., 282 U.S. 311, 51 S.Ct. 159, 75 L.ED. 359.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, provides, in pertinent part:

"...nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution, provides, in pertinent part:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction of equal protection of the laws."

STATEMENT OF THE CASE

Your Petitioner, Peter Schneckenburger, III at all relevant times was publicly employed by the City of Harahan, Louisiana as a part-time Regulatory Director. This Department issues building permits and enforces building regulations. It should be noted here that the record and the evidence will show Petitioner, Schneckenburger, did not take part in the issuing of the building permit, make any decisions relative thereto, never made any inspections or otherwise become involved in any activities of the Department concerning this matter. It is also noted that the record and evidence will show the Mayor of Harahan had the ultimate authority. No one could hire, fire or discipline except the Mayor.

Schneckenburger was seeking a piece

of property in the City of Harahan for the purpose of building a house for his daughter, who was to be married the following spring; because of this, the following innocent sequence of events took place, to-wit:

August 16, 1984: Schneckenburger purchased corner lot in City of Harahan from Ms. Zahn and other members of her family for \$7,500. Prior to such sale Zahn had been informed the lot was worth 18-20 Thousand dollars. Schneckenburger had made a verbal offer and subsequently Zahn received an offer \$15,000 but while she knew she was not legally bound to Schneckenburger, as she puts it in testimony, she was person of her word and proceeded with the sale to Schneckenburger.

November 28, 1984: A zoning variance applied for by Schneckenburger was granted in order that 22 feet by 80 feet house could be built instead of 14 1/2 feet by 80 feet house. The variance, as one member of the Zoning Board of Appeals put it was routine. The variance allowed zoning laws to be satisfied.

December 1, 1984: Schneckenburger took his daughter to see the lot. She refused the offer, saying she did not like the area and preferred to live in an apartment.

The following week Schneckenburger

informed Peter Fabacher, an electrical contractor and builder whom he had asked to build and draw plans for the house. Fabacher and Steven Richard were partners, Richard was the one actually doing the work on the plans. Fabacher offered to buy the lot. A purchase agreement was signed on December 7, 1984 and the sale to Fabacher was consummated on March 15, 1985 for a price of \$18,000. Fabacher and Richard obtained a building permit from Hilton J. Duvernay, a plan reviewer and building inspector for the regulatory department and who handled the matter from that time forward; never discussing it with or involving Schneckenburger, in any manner whatsoever.

The record and evidence will show the Board of Aldermen of the City of Harahan, the Mayor, the Board of Zoning Appeals invited all interested citizens

to a town meeting and reviewed the entire situation, ratified all actions and informed Fabacher to proceed with construction. Any potentiality of wrong doing, by any one connected with this permit, was never permitted to arise because of this meeting. As the saying goes, "There were a Thousand Eyes Watching".

Subsequently, after an investigative hearing the Louisiana Commission on Ethics for Public Employees found Schneckenburger violated R.S. 42:1111(C)(2)(d) relative to the sale of the property to Fabacher and R.S. 42:1113(A) relative to the zoning variance. Schneckenburger was fined \$1000 for each of the two violations.

An appeal was had to the Louisiana First Circuit Court of Appeal who reversed the Commission, in toto.

The matter arrived in the Louisiana Supreme Court by Writ of Review, was duly heard resulting in a 4-3 reversal of the Court of Appeal as to the violation of R.S. 42:1111(C)(2)(d), relative to the sale of property to Fabacher; and affirmed the Court of Appeal relative to the finding that there was no violation concerning R.S. 42:1113(A) as to the zoning variance. The fine of \$1000, in connection with R.S. 42:1111(C)(2)(d) violation was reinstated.¹

¹If events would have worked with the daughter Schneckenburger would still be before this Court. The daughter would have applied to Mr. Duvernay for a permit and Schneckenburger would have left the matter to the Mayor and Duvernay, the same as he did with Fabacher. The Commission would still have used its ax. There is no distinction as to what would have happened with the daughter and what did happen with Fabacher.

RAISING AND PRESERVING
THE CONSTITUTIONAL ISSUES

The consitutional issues cited herein was raised by Petitioner at his first opportunity in his appeal from the administrative decision of the Ethics Commission to the Louisiana Court of Appeal for the First Circuit. Such Court took notice of the Constitutional issues but did not treat them, to-wit:

"Since the Commission incor-
rectly concluded that Peter
Schneckenburger was in viola-
tion of the Code of Ethics, it
is unnecessary to address the
constitutional questions
suggested by counsel." in Re
Schneckenburger iii, 509 So2d
at 793.

Said Constitutional issues were urged in the Louisiana Supreme Court, in the original briefs, the rehearing and the brief on the rehearing, filed by Petitioner. The Louisiana Supreme Court failed to treat these important and

necessary Constitutional issues relating to the enforcement of the State Statutes involved upon petitioner and those similarity situated.

REASONS FOR GRANTING THE WRIT

This Honorable Court should and ought to grant the Writ applied for herein, otherwise:

1) Hundreds and perhaps Thousands of American Citizens, solely because of their employment by State, Municipal and County Agencies, Departments and Offices with community wide services and responsibilities, and for no other reason, will be deprived of their Constitutional Right, under the Fifth and Fourteenth Amendment to the United States Constitution, the Due Process and Equal Protection Clauses, thereof, to acquire and dispose of private property; such rights will not be regulated but abolished!

2) To Constitutionally allow the Statutory Scheme of LSA-R.S. 42:1111 (C)(2)(d), R.S. 42:1115(B)(1) and 42:1102(24) to be enforced, under the circumstances herein set out, abolishing the property interest of the right to dispose of private property, without a showing of wrongdoing or attempted wrongdoing and solely because the Citizen is employed by a Government is an irreparable insult to Due Process and Equal Protection of the Laws; and,

3) To allow the State to impose the taking of property interest, protected by the Constitution of the United States, solely because the Citizen is employed by Government, then to justify this taking as lawful and constitutional by jurisprudentially creating a vague and undefinable "Potentiality" of wrongdoing which has no foundation in the evidence,

the truth or reality, permits the State to sneak into the 5th and 14 Amendment and destroy, not regulate, the right to own and dispose of private property; and,

4) The survival of the Due Process and Equal Protection Clauses of the 5th and 14th Amendment to the Constitution of the United States will be placed in fatal jeopardy if this 4-3 decision of the Louisiana Supreme Court is allowed to stand under the high sounding name of "ETHICS", under the circumstances herein set out!

Concededly, it is now established to a point beyond all dispute that "public employment, including academic employment, may not be conditioned upon surrender of Constitutional Rights which could not be abridged by direct government action. Keyishian v. Board of Regents, 385 U.S. 589, 605, 87 S. Ct. 675, 685, 17 L.Ed. 2d 629, 642 (1967).

ARGUMENT

Petitioner, Peter Schneckenburger is an honest man, as attested to by the Louisiana First Circuit Court of Appeals:

"He merely paid and received a purchase price for a piece of property just as any other citizen would be entitled to do. ... The evidence fails to show that Schneckenburger received anything more than an honest profit in negotiating the property." In Re Schneckenburger, 509 So2d 790 at 792.

And,

As attested to by the Louisiana Supreme Court:

"The fact that Schneckenburger made a profit on the property does not indicate there was "actual corruption" involved in the sale. ... There is evidence that Zahn knew what she could get for the lot, and in fact Richard himself offered to pay Zahn \$15,000 for the lot without the variance, at the same time Schneckenburger was involved in negotiation with Zahn. Therefore, the price later paid by Fabacher to Schneckenburger was in line with the going value of the property and does not indicate

that either the obtaining of the permit or the variance figured into the price paid." In Re Schneckenburger, 518 So2d 497 (La. 1988) at 500.

But, the Louisiana Supreme Court, unable to find dishonesty or wrong doing of any kind creates the vague concept of potentiality, rather than actual wrong doing, to-wit:

"We explained that a 'conflict of interest' as envisioned by the code is a situation which would require an official to serve two masters, presenting a potential, rather than actual wrongdoing." In Re Schneckenburger, 518 So2d at page 500.

So, there you have it: with terms like, "envisioned", "would require", "potential", a State justifies depriving an honest citizen of his constitutional right to dispose of his property. In fact and truth, the record and evidence in this matter shows that Schneckenburger never had the potential of serving two masters; there was never a potential

conflict of interest; the Board of Aldermen, the Board of Zoning Appeal, the Mayor and Inspector Duvernay prevented a potentiality from ever arising. Consequently, we can now add the terms of "imaginary potential" and "speculative potential" and then add the concept of presuming that the "envisioned imaginary and speculative potential" exists, and of course, you arrive at a finding of a violation and a \$1000.00 fine very easy but not consistent with the Constitution. If nothing else, Jackson v. Virginia, 433 U.S. 307, 99 S.Ct. 2781, should prevent such a result.

With this concept of "potentiality" outstanding, in Louisiana, Alice's dialogue with the Queen comes frighteningly close to home:

"NO, NO!" SAID THE QUEEN. "SENTENCE FIRST--VERDICT AFTER."

"STUFF AND NONSENSE!" SAID ALICE LOUDLY.
"THE IDEA OF HAVING THE SENTENCE FIRST!"

"HOLD YOUR TONGUE!" SAID THE QUEEN,
TURNING PURPLE.

"I WON'T!" SAID ALICE.
(Excerpt from Alice in Wonderland,
"Alice's Evidence", by Lewis Carroll.)

Schneckenburger had a similar
dialogue with the State of Louisiana and
for all practical purposes such dialogue
could be expressed thusly:

STATE: FOR THE COMMON GOOD AND IN THE
NAME OF ETHICS THE STATE IS ABOLISHING
YOUR CONSTITUTIONAL RIGHT TO DISPOSE OF
YOUR PROPERTY AND SINCE YOU WILL NOT GIVE
IT TO US THE STATE FINES YOU \$1000. DO
YOU UNDERSTAND?

SCHNECKENBURGER: NO. AM I NOT FREE TO
DISPOSE OF MY PROPERTY WITHOUT BEING
PUNISHED? I WAS TAUGHT THE STATE HAD TO
PAY ME IF IT TOOK MY PROPERTY FOR THE
COMMON GOOD!

STATE: THAT PARTICULAR FREEDOM HAS JUST
BEEN ABOLISHED BY THE STATE'S POLICE
POWER.

SCHNECKENBURGER: WHAT HAPPENED TO THE
FIFTH AND FOURTEENTH AMENDMENTS????

The opinion of the Louisiana Supreme Court results in, as the Louisiana Court of Appeals correctly observes, " A contrary holding would result in a blanket prohibition against Schneckenburger from ever buying or selling property with any person, since anyone seeking to obtain a building permit, variance, or engage in other property transactions is required to conduct business with the regulatory department." In Re Schneckenburger, 509 So2d 790 at page 793. Actually, it is worse than this. The definition of "services in LSA-R.s. 42:1102(24) includes "leasing, rental or sale of movable or immovable property". He cannot even rent or lease immovable property, sell his home or sell his used furniture to any one in the community because everyone in the community who owns a home or other

immovable property will, more likely than not, have business with his department, in one way or another. If he inherits his father's house, located in Harahan, he could not sell, lease, rent or even hire someone to destroy it because all of this requires the attention of the regulatory board. He would have had to resign his government employment to do any of these things; things every American Citizen, working for the government, takes for granted.

To impose upon the Government Employee such burdens takes the Police Power "too far" and amounts to deprivation of rights in violation of the Due Process Clause of the 5th and 14th Amendment and the Equal Protection Clause thereof. To place this Condition on Public Employees is to deprive them of elemental and fundamental rights pro-

tected by the United States Constitution. While these rights may be reasonably regulated by the Police Power of the State, they may not be abolished simply because of Public Employment. There is no doubt the right to acquire, own, and dispose of real property is within the protective scope of the Fourteenth Amendment.

Appellant is a member of the Race Relations committee of St. James Presbyterian Church. Because the minister of that church is on the Association's Board of Directors, appellant was suspended from his job. He continued to participate in the Race Relations Committee and was then terminated.

...
Public Employees may not be dismissed or denied rehiring for exercising their constitutional rights.

...
The Government is thus precluded from achieving by indirection what it may not do directly.
The fact that the conflict of interest provisions is neutral on its face does not serve to validate Appellant's dismissal. Robinson v. Price, 615 F2d 1097 (5th Cir. 1980).

Robinson v. Price, supra involved a First Amendment Right (Right of Association) but we don't have to look at the 1st Amendment; the property rights protected by the 5th and 14th Amendment are on the same plane. The police power of the State, in the guise of providing ethics in government, cannot be used to abolish such property rights or make the surrender of them a condition of Public Employment and when it does, it goes "too far".

The exercise of the Police Power is not to be interfered with if it is within the scope of legislative authority, and the means reasonably tend to accomplish a lawful purpose, such power, broad as it is, cannot justify the passage of a law or ordinance running contrary to the limitations of the Federal Constitution. Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149.

Also this court said in Buchanan, supra, "Property is more than the mere

thing which a person owns." The Court further describes the essential attributes of property and declared such attributes protected by the United States Constitution, to-wit:

It is elementary that it (ownership) includes the right to acquire, use, and dispose of it. The Constitution protects these essential attributes of property. Holden v. Hardy, 169 U.S. 366, 391, 18 S.Ct. 383, 42 L. Ed.780. Property consists of the free use, enjoyment, and disposal of a persons' acquisitions without control or diminution save by the law of the land. Buchanan v. Warley, 245 U.S. 60, 38 S.Ct. 16, 62 L.Ed. 149.

It is of particular interest that the Buchanan case dealt with alienation of property and disposes of the question with the following language, "We think the attempt to prevent the alienation of the property in question to a person of color was not a legitimate exercise of the police power of the State, and in direct violation of the fundamental law

enacted in the Fourteenth Amendment of the Constitution preventing state interference with property rights except by due process of law. That being the case the ordinance cannot stand."

If the state cannot prevent an alienation of property then it can not punish for alienation of property, per se.

The Buchanan v. Warley case was subsequently used to reverse the decision of Harmon v. Tyler, 104 So 200 (La. 1925). See 47 S.Ct. 471, 273 U.S. 668, 71 L.Ed. 831.

The statutory scheme, with the jurisprudentially created "potentiality of wrongdoing" concept imposed upon Schneckenburger, solely because he is employed by government, results in a blanket prohibition against Schneckenburger from ever buying or selling

property, located in the city wide jurisdiction of his department, including his home, to any person, firm or entity, since anyone seeking to obtain a building permit, variance, or engage in other property transactions is required to conduct business and be regulated by his department. Under this scheme if the Government Employee is working in a State wide regulatory agency such as the State Fire Marshall's Office or the State's Ad Valorem Taxing Agency, then he would be prohibited from buying or selling property from any one in the entire state for every piece of property, in the State, because all such immovable property comes under this type of regulation. This Statutory Scheme goes "too far". See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 28 A.L.R. 1321, 67 L.Ed. 1322.

In a leading case decided many years ago, the Court of Appeals for the District of Columbia Circuit held that public employment in general was a "privilege", not a "right", and that procedural Due Process guarantees therefore were inapplicable. Bailey v. Richardson, 86 U.S. App. D.C. 248, 182 Fed 46, aff'd by an equally divided court, 341 U.S. 918, 71 S.Ct. 669, 95 L.Ed. 1352. The basis of this holding has been thoroughly undermined in the ensuing years. Mr. Justice Blackmun said in Graham v. richardson, 403 U.S. 365, 374, 91 S.Ct. 1848, 1853, 29 L.Ed. 2d 534 (See Footnote 9, 92 S.Ct. page 2709), "this court has now rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege".

In United State v. Chicago, M.,St.

P.&P. R. Co., 282 U.S. 311, 328-329, 51 S.Ct. 159, 163-164, 75 L.Ed. 359, this Court declared, "the right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the State which is hostile to the provisions of the Federal Constitution". This was in the tradition of Frost v. Railroad Comm'n, 271 U.S. 583, 594, 46 S.Ct. 605, 607, 70 L.Ed. 1101, where the Court emphasized that "If the state may compel the surrender of one constitutional right as a condition of the favor, it may, in like manner compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence. In Speiser v. Randall, 78 S.Ct. at 1338, we recognized that 'To deny an exemption to

claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same if the State were to fine them for this speech. ...No more can a tenant in a public housing project be evicted or the exercise of her right of association, a right protected by the First and Fourteenth Amendment. Thorpe v. Housing Authority of City of Durham, 87 S.Ct. 1244 (1967)".

The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 28 L.A.L.R. 1321, 67 L.Ed. 1322.

CONCLUSION

For all of the reasons set forth herein and such other reasons as this

Court may deem fit and proper a Writ of Certiorari to the Louisiana Supreme Court should and ought to issue herein and the opinion and judgment of that Honorable Court, concerned herein, should be vacated and reversed in that the Statutory Scheme imposed upon petitioner is unconstitutional per se or in the alternative is unconstitutional as applied to petitioner.

Respectfully submitted,

Samuel S. Dalton
Attorney for Petitioner
2001 Jefferson Highway
Jefferson, Louisiana 70121
(504) 835 4289

CERTIFICATE OF SERVICE

I, Samuel S. Dalton, a member of the Bar of this Court, hereby certify that on the 27 day of June, 1988, three copies of the Petition for Writ of Certiorari in the above entitled case were mailed, first class postage prepaid to:

William J. Guste, Jr.
Attorney General of State of Louisiana
State Capitol
P.O. Box 44005
Baton Rouge, Louisiana 70804

and

R. Gray Sexton, Attorney
Commission on Ethics for Public Employees
7434 Perkins Road, Suite B
Baton Rouge, Louisiana 70808-4379

I further certify that all parties required to be served have been served.

I further certify that all of the appendices attached hereto and filed herein are true copies of what they purport to be.

Sworn to before me
day of _____, 1988.

Samuel S. Dalton
Attorney for Petitioner

Notary

APPENDIX A

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Louisiana Supreme Court opinion of In Re Schneckenburger III, reported in 518 So2d 497, is reproduced herein in full:

In re Peter Schneckenburger III.

No. 87-C-1729

Supreme Court of Louisiana

Jan. 18, 1988

Rehearing Denied March 31, 1988

The Commission on Ethics for Public Employees found that a municipal director of inspection and code enforcement had violated two provisions of the code of ethics for governmental employees, and fine him \$1,000 for each of the two violations. The Court of Appeal, First Circuit, Parish of East Baton Rouge, reversed, 509 So2d 790. On writ of certiorari or review, the Supreme Court, Dixon, C.J., held that: (1) director had

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violated prohibition against public servant receiving thing of economic value in consideration of services rendered, but (2) director had not entered into a transaction that was under the supervision and jurisdiction of his agency.

Reversed in part and affirmed in part.

Dennis, J., concurred in part and dissented in part and assigned reasons.

Cole and Marcus, JJ. concurred in part and dissented in part for the reasons assigned by Dennis, J.

1. Municipal Corporations 192

Municipal director of inspection and code enforcement violated statute prohibiting public servants from receiving anything of economic value for or in

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consideration of services rendered, where he bought a lot, obtained a variance, and sold it to contractors and developers, and where, in order to build a house on the lot pursuant to the variance, permits were obtained by the purchasers from the director's department and inspections in conjunction with those permits were also carried out by that department, even though the fact that the director made a profit on a property did not indicate that there was actual corruption involved in the sale. LSA-R.S. 4211, subd. C(2)(d).

2. Municipal Corporations 192

Municipal director of inspection and code enforcement did not violate statute prohibiting public servant from entering into a transaction under the supervision

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and jurisdiction of his agency, in obtaining from the Board of Appeals a variance for lot which he had purchased, where the Board of Appeals was not part of the agency of which he was a director, even though applicants for variances had caption at top reciting the name of his department and a phone number which was the same as that used to reach the director's office. LSA-R.S. 42:1113, subd. A.

Maris LeBlanc, R. Gary Sexton, Baton Rouge, for applicant.

Samuel S. Dalton, Jefferson, for respondent.

DIXON, Chief Justice.

The issue here is whether the Code of Ethics for Governmental Employees was

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violated when the Director for the City of Harahan bought a city lot, obtained a zoning variance on the lot, and later sold the property at a profit to a contractor/builder, who obtained a permit to build including the variance.

The Commission on Ethics for Public Employees held that Peter Schneckenburger violated R.S. 42:1111(C)(2)(d) and R.S. 42: 1113(A) of the Code of Ethics for Government Employees and fined him \$1000.00 for each of two violations. The court of appeal reversed. In Re Peter Schneckenburger, iii, 509 So2d 790 (La. App. 1st Cir. 1987). We reverse in part and affirm in part.

Schneckenburger has been the Regulatory Director or the Director of

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Inspection and Code Enforcement for the City of Harahan since 1980. This is an appointed position for which Schnec-kenburger works four hours a week in the evening. His duties include supervising "field inspections of buildings and structures for safe construction and condition, and for compliance with city building code and zoning ordinances." Employees under his supervision grant permits and perform inspections in connection with those permits.

On August 16, 1984 Schneckenburg-er purchased lot 155, Sq. N-2, Harahan City Subdivision from Bennie Zahn and other members of her family for \$7500. Prior to the sale Mrs. Zahn had the lot surveyed by Don Garland, a surveyor, in prepara-

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tion for removal of decayed trees which had been the subject of neighborhood complaints. Mrs. Zahn had been administering the property, which was part of an inheritance, and told Garland she was interest in selling the property for \$8000.00 to \$10,000. Garland told Zahn the lot was worth from \$18,000 to \$20,000. In passing, Garland mentioned to Schneckenburger and to Steven Richard, a local builder, that Zahn was interested in selling the lot. Schneckenburger bought the property to build a house for his daughter, who was to be married the following spring. The \$7,500 price was arrived at by deducting from Zahn's \$10,000 price the expense necessary to cut and remove the decaying trees.

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After Schneckenburger's verbal offer, but prior to the sale, Zahn received an offer from Richard to buy the lot for \$15,000.00, but Zahn testified she felt a "moral" not a legal, obligation to sell to Schneckenburger.

For a short time at the end of October or beginning of November, Schneckenburger put a "For Sale" sign up at the lot to invite offers in order to arrive at the value of the property for purposes of obtaining a bank loan for building. Schneckenburger also applied for a variance from the Harahan Appeals Board. The variance was granted on November 29, 1984 over the objections of several neighboring property owners. The lot was 30' by 120' corner lot on which

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a 14 1/2' x 80' single family dwelling could have been built in accordance with the zoning laws. The variance allowed a 22' x 80' house to be built on the lot.

Three days after getting the variance Schneckenburger took his daughter to see the lot and told her of his plan. she refused the offer, saying she did not like the area and preferred to live in an apartment.

The following week Schneckenburger contacted Peter Fabacher, an electrical contractor and builder whom he had asked to build and draw plans for the house. Schneckenburger told Fabacher not to proceed any further with the plans. Fabacher and Steven Richard were partners, and Richard was the one who was

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actually doing the work on the plans. At this time Fabacher offered to buy the lot. A purchase agreement was signed on December 7, 1984, and the sale to Fabacher was consummated on March 15, 1985 for a sale price of \$18,000.

Fabacher and Richard obtained a building permit which included the variance. The permit was obtained from Hilton J. duvernay, a plan reviewer and building inspector for the regulatory department. Members of the Board of Appeals testified that they had been under the impression that variances were not transferable on the same lot from one owner to another, until the Attorney General of the State of Louisiana issued Opinion Number 85-316 on April 18, 1985

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stating that a new owner may execute the same variance when the conditions leading to the granting of the variance remain the same. Duvernay also testified that it was his impression that a variance was granted on the lot, not to the person and therefore transferable. Schneckenburger received a letter informing him that the variance had been granted. Although the letters which were sent out up to and including August, 1984 contained a phrase informing the landowner that the variances were not transferable, the letter which Schneckenburger received, and the letters after this time, did not include this non-transferability information.

After an investigative hearing, the Louisiana State Board of Ethics found

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Schneckburger violated R.S. 42:1111(C)-(2)(d) and R.S. 42:1113(A). He was fined \$1000 for each of the two violations.

The court of appeal reversed the finding of the Commission on Ethics. On the R.S. 42:1111(C)(2)(d) violation the court found no "service" had been performed since no "salary" was received and no work was performed in selling the property to a company doing business with his agency. The Court of Appeal also held that the evidence failed to show that Schneckenburger "received anything more than an honest profit in negotiating the property." The court went on to say that Schneckenburger did not receive compensation for services rendered to Fabacher "whereby he knew or reasonably

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should have known that Mr. Fabacher may have been seeking to obtain a business relationship with the regulatory department." On the R.S. 42:1113(A) violation the court found no indication that Schneckenburger personally or directly participated in the granting of a building permit with the transferable variance to Fabacher and no evidence that he influenced the Board of Appeals in approving his variance. "There is no indication that Schneckenburger's part-time (four hours a week) position of supervising the regulatory department created any impropriety on his part."

R.S. 42:1111(C)(2)(d) provides as follows:

"(2) No public servant and no legal

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entity in which the public servant exercises control or owns an interest in excess of twenty-five percent, shall receive any thing of economic value for or in consideration of services rendered, or to be rendered, to or for any person during his public service unless such services are: (d) Neither performed for nor compensated by any person from whom such public servant would be prohibited by R.S. 42:1115(A)(1) or (B) from receiving a gift.¹

¹ R.S. 42:1115 provides as follows:

"A. No Public servant shall solicit or accept, directly or indirectly, anything of economic value as gift or gratuity from any person or from any officer, director, agent, or employee of such person, if such public official knows or reasonably should know that such person:

- 1) Has or is seeking to obtain contractual or other business or financial relationships with the public servant's agency, or
- 2) Is seeking, for compensation, to influence the passage or defeat of legislation by the public by the public

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[1] Schneckenburger is prohibited by this section of the code from receiving anything of economic value for services rendered to a person from whom he would be prohibited from receiving a gift, and under R.S. 42:1102(24) "services" is defined to include the sale of immovable property. Section 1115(B) of the code (R.S. 42:1115(B)) prohibits Schneckenburger from receiving a gift from a

servant's agency.

B. No public employee shall solicit or accept, directly or indirectly, anything of economic value as a gift or gratuity from any person or from any officer, director, agent, or employee of such person, if such public employee knows or reasonably should know that such person:

(1) Conducts operations or activities which are regulated by the public employee's agency.

(2) Has interests which may be substantially affected by the performance or nonperformance of the public employee's official duty."

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person who is regulated by his agency or who has interests that may be substantially affected by the performance or nonperformance of the official duties. Schneckenburger sold a lot to Fabacher and Richard, who are contractors and developers. In order to build a house on the lot, permits were obtained by Fabacher and Richard from the department of which Schneckenburger is the director. Inspections in conjunction with those permits were also carried out by the regulatory Department. Schneckenburger, as director of that department, had the ultimate authority over the issuance of the permits. Thus, as a contractor and also because of his plans to construct a house on the property purchased from

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Schneckenburger, Fabacher was subject to the regulation of schneckenburger;s agency, the Regulatory Department, and had interests which may have been substantially affected by Schneckenburger's performance or nonperformance of his official duties as Regulatory Director. Therefore, Schneckenburger was prohibited by R.s. 42:1111(C)(2)(d) of the code from receiving any thing of economic value (the purchase price of the property) from Peter Fabacher in consideration of the sale of immovable property.

The fact that Schneckenburger made a profit on the property does not indicate that there was "actual corruption" involved in the sale. See, In Re Sea

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Shell, Inc, 509 So2d 90 (La. App. 1st Cir. 1987). There is evidence that Zahn knew what she could get for the lot, and in fact Richard himself offered to pay Zahn \$15,000 for the lot without the variance, at the same time Schneckenburger was involved in negotiations with Zahn. Therefore, the price later paid by Fabacher to Schneckenburger was in line with the going value of the property and does not indicate that either the obtaining of the permit or the variance figured into the price paid.

However, in Glazer v. Commission on Ethics for Public employees, 431 So2d 752 (la. 1983), this court explained that the primary objective of the Code of Ethics for Governmental Employees is not to

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apprehend and punish persons guilty of public wrongdoing, but to prevent public officers and employees from becoming involved in conflicts of interest. In that case we also said that R.S. 42:1111-(C)(2)(d), which prohibits public servants from receiving any thing of economic value for or in consideration of services rendered, must be read as prohibiting conflicts of interests in ordinary as well as in special business deals and hence as prohibiting arms-length transactions in any conflict of interest situation. We explained that a "conflict of interest" as envisioned by the code is a situation which would require an official to serve two masters, presenting a potential, rather than

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actual wrongdoing.

On the issue of the R.S. 42:1111(C)-(2)(d) charge, therefore, we find that there was a violation which made Schneck-enburger subject to the fine imposed on him by the Commission on Ethics. We reverse the court of appeal on this issue and reinstate the finding of the commission.

R.S. 42:1113(A) provides as follows:

"A. No public servant, excluding any legislator and any appointed member of any board or commission and any member of a governing authority of a parish with a population of ten thousand or less, or member of such public servant's immediate family, or legal entity in

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which he has a controlling interest shall bid on or enter into any contract, subcontract, or other transaction that is under the supervision or jurisdiction of the agency of such public servant."

[2] Under this section of the code, the commission found Schneckenburger violated the code by entering into a transaction-obtaining a zoning variance-that was under the supervision and jurisdiction of his agency, the Regulatory Department. Counsel for a the commission admitted during oral arguments that it was a close factual issue as to whether or not the Board of Appeals which granted the variance was "under the supervision or jurisdiction of the

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agency" of which Schneckenburger was the director. We find that the Board of Appeals was not part of the agency of which Schneckenburger was director and, therefore, reverse on this issue.

Mayor Carlo Ferrara testified that Schneckenburger, was appointed by the Mayor, had no duties to or control over the Board of Appeals which is a separate entity from the Regulatory Department over which Schneckenburger is director. He plays no part in the decisions made by the Board of appeals and he is not assigned as a consultant to the Board. Schneckenburger's department simply sees that variances which are granted by the Board are carried out after the fact. Although the applications for variances

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have a caption at the top which reads, "Department of Regulatory Inspections" and a phone number which is the same as that used to reach Schneckenburger's office, the Mayor explained that this is so because the phone number is simply a direct line to the secretary who works of several departments including the Sewerage Department, the Appeals Board and the Regulatory Department. This secretary places people with applications for variances on the Appeals Board Agenda. Schneckenburger does not have anything to do with the handling or processing of the applications for variances. The Appeals Board can also be reached by calling the general phone number listed for the city hall.

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Because the Board of Appeals was not Schneckenbruger's agency, he did not transact business with an agency under his supervision or jurisdiction. For reasons different from those of the court of appeal, we affirm its judgment reversing the commission's finding on claimed violation of R.S. 42:1113(A). Furthermore, for reasons previously stated, we reverse the court of appeal on the issue of the R.S. 42:1111(C)(2)(d) violation and reinstate the finding of the commission on Ethics imposing a fine of \$1000 on Peter Schneckenburger III. Costs are divided equally between the parties.

DENNIS, J., concurs and dissents in part and assigns reasons.

MARCUS AND COLE, JJ., concur in part

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and dissent in part, for the reasons assigned by DENNIS, J.

DENNIS, Justice, concurring in part and dissenting in part.

I concur in the majority's finding that Mr. Schneckenburger did not violate La. R.S. 42:1113(A), but I respectfully dissent from its determination that he breached La. R.S. 42:1111(C)(2)(d). The objective of the Code of Ethics is to prevent public officers and employees from becoming involved in conflicts of interest, viz., situations which would require an official to serve two masters, presenting a potential, rather than an actuality of wrongdoing. Glazer v. Com. on Ethics, 431 So2d 752 (La. 1983). The record shows without dispute that the

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issuance of a building permit is purely a ministerial duty which does not involve a purely ministerial duty which does not involve the exercise of any discretion and therefore cannot be the object of influence, partiality or avarice. Consequently, because the building permit situation does not present either a potential or an actuality of wrongdoing, it does not appear that it is a real conflict of interest that the Code was enacted to prevent.

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Notice of Louisiana Supreme Court's
Denial of Rehearing Reproduced
in full below

SUPREME COURT
STATE OF LOUISIANA
NEW ORLEANS

March 31, 1988

Samuel S. Dalton
2001 Jefferson Hwy.
P.O. Box 10501-81
Jefferson, La. 70121

Marie LeBlanc, Esq.
R. Gray Sexton, Esq.
7434 Perkins Rd. Suite B
Baton Rouge, La. 70808-4379

Re: IN RE PETER SCHNECKENBURGER, III
No. 87-C-1729

Dear Counsel:

Enclosed please find a News Release documenting this Court's denial of the application for rehearing, in the above entitled reference case.

The judgment is now final. By copy of this letter we are advising both the trial court and appellate court of the

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finality of this case and instructing them to do whatever is necessary to implement the judgment.

With kindest regards, I remain,

Very Truly yours,

S/ Frans J. Labranche, Jr.
Clerk of Court

FJLJr:kps

Enclosure

ccs: Hon. Robert C. Synder
Hon. Stanley Lemoine

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JUSTICE LEMMON, Concurring in the Denial
of Rehearing reproduced below

SUPREME COURT OF LOUISIANA

NO. 87-C-1729

IN RE: PETER SCHNECKENBURGER, III

JUSTICE LEMMON, Concurring in the Denial
of Rehearing

Respondent was prohibited by R.S. 42:1111(C)(2)(d), not from selling real estate to a person who would be required to obtain a building permit from the Public's Servant's agency, but from selling real estate to a "person (who) conducts operations or activities which are regulated by the public employee's agency". If respondent's vendee had been a school teacher or a policemen (instead of building contractor whose business operation was regularly inspected for permits and codal compliance by respon-

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dent's agency), there would have been no violation.¹

¹The dissent points out that issuance of building permits is a purely ministerial duty. However, the agency's primary regulatory duties involved inspections of ongoing and completed construction to ensure compliance with applicable building and zoning codes, and these duties entailed considerable discretion.

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LOUISIANA SUPREME COURT'S STAY OF
IT'S DECISION PENDING APPLICATION
OF
FOR WRIT OF CERTIORARI IN THE
IN
THE UNITED STATES SUPREME COURT
(Reproduced in Full Below)

SUPREME COURT
STATE OF LOUISIANA
NEW ORLEANS

April 7, 1988

Samuel S. Dalton, Esq.
Attorney at Law
2001 Jefferson Hwy
P.O. Box 10501
Jefferson, La. 70181

In Re: Peter Schneckenburger, III
No. 87-C-1729

Dear Mr. Dalton:

This is to advise that the Court took the following action on the Motion for Stay Order Pending the Timely Filing of an Application for Certiorari in the Supreme Court of the United States and Final

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Action of that court in the above entitled matter.

"IT IS ORDERED that the enforcement of this Court's Judgment contained in its decision dated January 18, 1988, in the above numbered and entitled matter be and is hereby stayed pending timely application for a Writ of Certiorari to the Honorable, the Supreme Court of the United States of America and the final action of that court".

With kindest regards, I remain,

Very truly yours,

Frans J. Labranche, Jr.
Clerk of Court

By: S/John Tarlton Olivier
Clerk of Court

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Louisiana Court of Appeal's for the First Circuit opinion of In Re Schneckenburger III, reported in 509 So2d 790, is reproduced herein in full:

In re Peter SCHNECKENBURGER, III

NO. CA86 0622

June 23, 1987

Writ Granted Oct. 9, 1987

Building inspector appealed from decision of the Commission on Ethics for Public Employees which held that he had violated the code of ethics for governmental employees. The Court of Appeal, Alfrod, J., held that building inspector had not received a salary for performing work for a company doing business with his agency nor created a conflict of interest by purchaing property, obtaining

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a variance, and then selling the property at a profit.

Reversed.

Lanier, J., concurred in the result.

Samuel S. Dalton, Dalton, Gillen & Roniger, Jefferson, for appellant.

R. Gray Sexton, Peter G. Wright, Maris E. Leblanc, Commission on Ethics for Public Employees, Baton Rouge, for Appellee.

Before Grover L. Covington, C.J. and Lanier and Alford, JJ.

ALFORD, Judge.

Peter Schneckenburger, III (Schneckenburger) appeals a decision of the Commission on Ethics for Public Employees (the Commission), which held that he violated LSA-R.S. 42:1111(C)(2)(d) and 42:1113(A) of the code of ethics for

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Governmental Employees.

FACTS

Schneckenburger has been the part-time director of Inspection & code Enforcement for the city of Harahan, Louisiana, since 1980. This is an appointed position whose duties included supervising "field inspections of buildings and structures for safe construction and condition, and for compliance with city building code and zoning ordinances".

— Around May of 1984, Ms. Bennie Jay Zahn, the owner of a corner lot of immovable property measuring 30'x 120' in Harahan, contacted Schneckenburger about having two trees removed from adjacent city-owned property. The two also discussed the sale of this lot and

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verbally agreed on a purchase price of \$7,500.00. Ms. Zahn testified at the public hearing held in November of 1985 that she had first mentioned \$10,000.00 but accepted \$7,500.00 to allow for the price of the tress' removal. Ms. Zahn subsequently received an offer of \$10,000.00 from Mr. Peter Fabacher, an electrical contractor and builder, but she refused his offer since she felt a moral obligation to honor her verbal agreement with Schneckenburger. She was fully aware that the verbal agreement was not legally binding.

The act of cash sale to Schneckenburger was signed August 16, 1984. Around the end of October or the beginning of November, Schneckenburger put a "For Sale" sign in the yard solely to invite

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offers for the purpose of appraising the property and applying for a loan. The sign was removed shortly afterward. Schneckenburger bought this lot with intention of building a house for his daughter, who was engaged to be married. A 14 1/2' x 80' single family dwelling could have been built on this lot in accordance with applicable zoning ordinance. On November 1, 1984, Schneckenburger applied to the Department of Regulatory Inspections for a 2' side yard variance on the interior side lot line and a 5 1/2' side yard variance on the street side lot line, so as to enable him to build a 22' x 80' house for his daughter. He appeared before the Harahan Board of Appeals and stated without this variance the narrowness of the lot would

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not permit a house of comparable size to the neighborhood to be built. Mr. Hilton J. Duvernay, plan reviewer and building inspector for the regulatory department, testified that a 30' corner lot is not a normal situation in a residential zoning property.

Schneckenburger's request was granted by the Board of Appeals at its regular meeting on November 28, 1984, along with at least two other variances applied for on other properties by other applicants. The Board is authorized by the zoning ordinance of the city of Harahan to grant a variance "where exceptional and peculiar hardship would be caused by enforcement of the regulations in this Ordinance and where such variance would not substantially derogate

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from the intent of this Ordinance but not otherwise." The chairman of the Board of Appeals testified that "[t]hat particular lot deserved the variance." Another member of the Board testified that Schneckenburger used no undue influence to obtain the variance, and that he would have granted he variance to anyone else under the same circumstances, i.e., with the same hardship. Schneckenburger testified that he is not involved in the Board's deliberations and that an applicant may request a variance without contacting him personally.

Three days after Schneckenburger obtained the variance, he surprised his daughter with his plans to build the house for her. she declined his gesture, stating she did not like the neighborhood

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and wished to live in an apartment. Schneckenburger then contacted Mr. Fabacher, who was hired to build the house, in order to cancel the plans. Mr. Fabacher offered to buy the property from Schneckenburger and planned to build the same house for himself. The two signed a purchase agreement on December 7, 1984, for the price of \$18,000.00 and consummated the sale on March 15, 1985. Mr. Don Garland, surveyor of the property, testified that Ms. Zahn's price was too low and that any buildable lot in Harahan would be worth \$18,000.00 to \$20,000.00, even without the variance.

Mr. Fabacher and his business partner, Steven Richard, subsequently obtained a building permit that included the variance from Mr Duvernay in the

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regulatory department, authorizing the construction of a 22' x 80' residence on the lot. The Board of Appeals had been under the impression that variances were not transferable on the same lot from one owner to another, until the Attorney General of the State of Louisiana issued Opinion Number 85-316 on April 18, 1985, stating that a new owner may execute the same variance when the conditions leading to the granting of the variance remain the same.

After an investigative hearing and meeting of the Louisiana State Board of Ethics were held, Schneckenburger was cited for two violations of the Code of Ethics for Governmental Employees. He was found not to have violated LSA-R.S. 42:1112(A). He was fined \$2,000.00 and

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has taken this appeal.

LAW

La. Const. of 1974, Art. X, Sec. 21 directed the legislature to enact a code of ethics for all officials and employees of the State and its political subdivisions and to create on or more boards to administer the code. Pursuant to this mandate, the legislature enacted the code of Ethics for Government Employees. LSA-R.S. 42:1101 et seq. Among its multiple policy objectives are impartiality, fairness and quality of treatment toward those dealing with government; assurance that decisions of public importance will not be influenced by private considerations; maintenance of public confidence in government (wherein enters the matter of appearances); and prevention of use of

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public office for private gain. LSA-R.S. 42:1101(B); Glazer v. Commission on Ethics for Public Employees, 431 So2ds 752 (La. 1983).

[1] The two statutes Schneckenburger is accused of violating are LSA-R.s. 42:1111(C)(2)(d) and 42:1113(A). LSA-R.S. 42:1111(C)(2)(d) provides as follows:

(2) No public servant and no legal entity in which the public servant exercise control or owns an interest in excess of twenty-five percent, shall receive any thing of economic value for or in consideration of services rendered, or to be rendered, to or for any person during his public service unless such services are:

(d) Neither performed for nor compensated by any person from whom such

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public servant would be prohibited by R.S. 42:115(A)(1) or (B) from receiving a gift.¹

In other words, LSA-R.S. 42:1111(C)(2)(d) prohibits a person from drawing a salary

¹ LSA-R.S. 42:1115(A)(1) and (B) provide as follows:

A. No public servant shall solicit or accept, directly or indirectly, any thing of economic value as a gift or gratuity from any person or from any officer, director, agent, or employee of such person, if such public servant knows or reasonably should know that such person:

(1) Has or is seeking to obtain contractual or other business or financial relationships with the public servant's agency, or

B. No public employee shall solicit or accept, directly or indirectly, anything of economic value as a gift or gratuity from any person or from any officer, director, agent, or employee of such person, if such public employee known or reasonably should know that such person:

(1) Conducts operations or activities which are regulated by the public employee's agency.

(2) Has interests which may be substantially affected by the performance or nonperformance of the public employee's official duty.

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for his services to a company, if that company is doing business with the public servant's agency. In re Beychok, 484 So2d 912 (La. App. 1st cir. 1986), reversed on other grounds, 495 So2d 1278 (La. 1986). Put another way, this section prohibits a public servant from performing work where the work is performed for, or paid for, by persons seeking a business relationship with his agency. Brusssard v. Commission on Ethics for Public Employees, 461 So2d 1227 (La. App. 1st Cir. 1984).

Although LSA-R.S. 42:1102(24) defines "service" to include the sale of immovable property, Schneckenburger did not receive a "salary" nor did he "perform work" in selling the property to a company doing business with his agency.

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He merely paid and received a purchase price for a piece of property just as any other citizen would be entitled to do. The discrepancy between his buying and selling price was perhaps due to Ms. Zahn's lack of business judgment in failing to obtain the highest price she could for her lot. The evidence fails to show that Schneckenburger received anything more than an honest profit in negotiating the property. We cannot conclude that Schneckenburger received compensation for services rendered to Mr. Fabacher whereby he knew or reasonably should have known that Mr. Fabacher may have been seeking to obtain a business relationship with the regulatory department. A contrary holding would result in a blanket prohibition against

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Schneckenburger from ever buying or selling property with any person since anyone seeking to obtain a building permit, variance, or engage in other property transactions is required to conduct business with the regulatory department.

As for the second alleged violation, LSA-R.S. 42:1113(A) provides:

Sec. 1113.

A. No public servant, excluding any legislator and any appointed member of any board or commission and any member of a governing authority of a parish with a population of ten thousand or less, or member of such public servant's immediate family, or legal entity in which he has controlling interest shall bid on or enter into any contract, subcontract, or

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other transaction that is under the supervision or jurisdiction of the agency of such public servant.

[3,4] The policy behind prohibiting a public servant from entering into any transaction that is under the supervision or jurisdiction of his agency is to prevent a real and substantial conflict of interest. A conflict of interest is a situation which would require an official to serve two masters, presenting a potential, rather than an actuality, of wrongdoing. Glazer, 431 So2d at 756.

However, there is no requirement in the instant case that Schneckenburger must personally or directly participate in every application for a building permit or variance submitted to his office. There is no evidence of any undue

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influence by Schneckenburger on the Board of Appeals in approving the variance. Mr. Duvernay is the one who issued Mr. Fabacher a building permit with the transferable variance. It is apparent that granting such variance and permits under similar circumstances is "routine and mechanical thing." See Hill v. Commission on Ethics for Public Employees, 453 So2d 558 (La. 1984). There is no indication that Schneckenburger's part-time (four hours a week) position of supervising the regulatory department created any impropriety on his part. 453 So2d at 561.

The findings and conclusions of the commission are therefore insufficient to support a violation of the Code of Ethics. The evidence does not support a

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violation of the spirit of the Code. The Commission found only a remote possibility of a conflict of interest which it could not pinpoint or document. 453 So2d at 563.

Since the Commission incorrectly concluded that Peter Schneckenburger was in violation of the Code of Governmental Ethics, it is unnecessary to address the constitutional questions suggested by counsel. The decision of the Commission on Ethics for Public Employees is hereby reversed and set aside. Costs in the amount of \$60.00 are assessed against the Commission.

REVERSED.

LANIER, J., concurs in the result._

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APPENDIX C

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THE DECISION OF THE STATE COMMISSION
ON ETHICS FOR PUBLIC EMPLOYEES
IS REPRODUCED IN FULL HEREIN:

COMMISSION ON ETHICS FOR PUBLIC EMPLOYEES

DATED: February 21, 1986

FILED: February 21, 1986

OPINION NO.
85-101

On November 21, 1985 and December 17, 1985 the Commission on Ethics for Public Employees (the "Commission") conducted public hearing for the purpose of exploring the following:

CHARGES

I.

That Mr. Peter Schneckenburger violated Section 1111 C(2)(d) of the Louisiana Code of governmental Ethics (La. R.s. 42:1111 C(2)(d) by having sold lot 155, Sq. N-2, Harahan Subdivision, to Mr. Peter Fabacher, a Harahan contractor who planned to and did in fact build a home on the lot; was subject, through

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inspection, to the regulation of the Harahan Regulatory Board, of which Mr. Schneckenburger was Director; and who thereby had interests that may have been substantially affected by Mr. Schneckenburger's performance or nonperformance of his official duties as the Director of the Harahan Regulatory Board.

II.

That Mr. Peter Schneckenburger violated Section 1113 A of the Louisiana Code of Governmental Ethics (La. R.S. 42:1113 A) by having applied for a variance from the City of Harahan's zoning ordinances, the enforcement of which is under the supervision and jurisdiction of the Harahan Regulatory Board, for which he was the Director.

III.

That Mr. Peter Schneckenburger violated Section 1112 A of the Louisiana code of Governmental Ethics (La. R.S. 42:1112 A) by having advised persons including Mr. Louis Cundiff and Mrs. Bennie Zahn, relative to the feasibility of building on the lot described more particularly in paragraph I above at a time at which he had a substantial economic interest in his advice to them because he was interested in purchasing that lot.

At the conclusion of the public hearing the Commission found violations

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of Charges I and II and dismissed Charge III. during the course of this public hearing, the Commission received testimony and exhibits and, on the basis of the evidence received, makes the following:

FINDINGS OF FACT

1. At all times material hereto Peter Schneckenburger, III ("Respondent") was the "Regulatory Director" of the city of Harahan (the "City").

2. The official duties of the Regulatory Director include serving as the chief executive and chief administrative officer for the City's "Regulatory Department," which has jurisdiction to administer and enforce the City's zoning and building ordinances, generally, including but not limited to the enforce

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ment of compliance with variances granted by the City's "Appeals Board," the issuance of building permits, and the performance of inspections in conjunction with those permits. The purpose of these inspections is to insure that buildings are constructed within the City are in compliance with applicable zoning and building ordinances.

3. On August 16, 1984 the Respondent purchased lot 155, Sq. N-2, Harahan Subdivision ("Lot 155") from Bennie J. Zahn, et al for the price of \$7500.

4. Lot 155 was a 30' x 120' corner lot situated in the City of Harahan on which a 14 1/2' x 80' single family dwelling could have been built in accordance with applicable zoning laws.

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5. On November 1, 1984 the Respondent applied to the Harahan Appeals Board for a zoning variance on Lot 155 in order to build a 22' x 80' housed.

6. At the November 28, 1984 meeting of the harahan Appeal's Board, the Respondent was granted the variance requested on Lot 155 over the objection of several neighbors.

7. Prior to the November 28, 1984 Appeal's Board meeting Respondent had place a "for sale" sign on Lot 155.

8. The majority of the Appeals Board members were of the opinion that the variances they granted were granted personally to the applicant and, if unexecuted, were not transferrable to subsequent owners. Respondent knew or reasonably should have known, of the

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Appeal's Board expressions in its letters granting variances to the effect that variances were not transferrable.

9. On December 7, 1984, Respondent entered into an agreement to sell lot 155 to Peter Fabacher and Steven Richard for the sum of \$18,000, and, at that time, knew that they anticipated constructing on the lot a structure having dimensions grater than 14 1/2' x 80'.

10. The aforementioned agreement to sell was consummated on March 15, 1985.

11. Peter Fabacher was a contractor who routinely submitted applications for permits to the Regulatory Department, and at all material times hereto Respondent knew this.

12. On March 19, 1985 the Harahan Regulatory Department issued to Peter

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Fabacher and Steven Richard a building permit authorizing the construction of a 22' x 80' residence on Lot 155.

13. Peter Fabacher and Steven richard neither sought nor obtained any variance for lot 155, but constructed upon Lot 155 a 22' x 80' residence.

14. During construction of this residence it was subject to periodic inspections by employees of the Harahan Regulatory Department for the purpose of monitoring compliance with the City's zoning and building ordinances.

APPLICABLE LAW

The Commission views as controlling Sections 1111C(2)(d) and 1113 A of the code of Governmental Ethics (La. R.S. 42:1111C(2)(d) and 1113 A).

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Section 1111 C(2)(d) provides as follows:

1111. Payments from nonpublic sources

* * * * *

C. Payments for nonpublic service.

* * * * *

(2) No public servant and no legal entity in which the public servant exercises control or owns an interest in excess of twenty -five percent, shall receive any thing of economic value for or in consideration of services rendered, or to be rendered, to or for any person during his public service unless such services are:

* * * * *

d) neither performed for compensated by any person from whom such public servant would be prohibited by R.S. 42:1115 A(1) or B from receiving a gift.

This section of the Code prohibits

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the Respondent from receiving any thing of economic value for services rendered to a person from whom he would be prohibited from receiving a gift. Section 1115 B of the Code (La. R.S. 42:1115 B) prohibits the respondent from receiving a gift from any person who is regulated by his agency, the Regulatory Department, or who has interests that may be substantially affected by the performance or nonperformance of his official duties.,

The term "service" as used in Section 1111C(2)(d) is defined in Section 1102(24) of the Code (La. R.S. 42:1102(24)) to include sale of immovable property.

Section 1113 A of the Code provides in pertinent part as follows:

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No public servant . . . shall bid on or enter into any contract, subcontract, or other transaction which is under the supervision or jurisdiction of the agency of such public servant.

OPINION

It is the opinion and conclusion of the Commission that the Respondent violated Sections 1111 C(2)(d) and 1113 A of the Code of Governmental Ethics.

The respondent sold lot 155 as to Peter Fabacher, a contractor, and his partner Steven Richard for \$10,500 profit, and was aware that Mr. Fabacher was planning to build a house on that lot. In fact, Respondent knew that Mr. Fabacher and Mr. Richard were intending to use the same house plans that he had previously requested that they draw up for him to build a house for his daughter

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on that same lot. These plans took into account the variances obtained by Respondent. Respondent knew or should have known that the Appeal's Board was of the opinion that unexecuted variances were not transferable.

In order to build this house, various required permits were obtained from the Regulatory Department by Peter Fabacher and Steven Richard. Inspections in conjunction with those permits were also carried out by the Regulatory Department. As Director of that Department, Respondent had the ultimate authority over the issuance of those permits. Thus, as a contractor, generally, and because of his plans to construct a house on Lot 155, in particular, at the time of and all times

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after the sale, Peter Fabacher was subject to the regulation of Respondent's agency, the Regulatory Department, and had interests that may have been substantially affected by Respondent's performance or nonperformance of his official duties as Regulatory Director. Respondent was therefore prohibited by Section 1111 C(2)(d) of the code from receiving anything of economic value from Peter Fabacher in consideration of the sale of immovable property.

The Respondent additionally violated the Ethics code by entering into a transaction--obtaining a zoning variance--that was under the supervision and jurisdiction of his agency, the Regulatory Department. The application for a variance was submitted to the Appeals

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Board on a form headed "Department of Regulatory Inspections." It is that same department that must issue permits in accordance the provisions of the variance and that, through permits and inspections, enforces compliance with the variance.

Thus, by obtaining a zoning variance, the Respondent entered into a transaction subject to the supervision and jurisdiction of his agency.

With respect to the third charge that Respondent violated Section 1112 A of the code (La. r.S. 42:1112 A) by advising persons about lot 155 at a time when he was interest in purchasing the lot, the Commission specifically finds that no violation occurred. The evidence did not show that Respondent had a

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substantial economic interest in the lot at the time the advice was given.

It is therefore the conclusion of the Commission that Peter Schneckenburger violated Sections 1111 C(2)(d) and 1113 A of the Code as specified in Charges I and II. The Commission further concludes that for each of these two violations a \$1000.00 fine is imposed.

The Commission is of the opinion that the imposition of a fine in this case is essential for two reasons. First, as a result of his actions in this matter, the Respondent was able to realize a substantial profit. Second, all objective considerations weight against the Commission concluding that the Respondent acted in good faith in these transactions. By all reasonable stan-

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dards, the Respondent should have known of the Appeals Board's position that variances that it granted were nontransferable, and it was incumbent upon him, through his authority to refuse building permits and through the inspection process, to insure that variance granted by the Appeals Board were complied with. In light of the Appeals Board repeated expressions in numerous variances to the effect that variances were not transferable, the Commission finds that the Respondent's testimony to the effect that he was unaware of the Appeals Board position on this issue is not credible. Because the language on nontransferability was actually a part of the text of numerous variances, and because the Regulatory Department reviewed those

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variances as a part of the process of granting building permits for property for which variances had been granted, the Regulatory Department could not have been unaware of the appeals Board's position on the transferability issue. For these reasons, the Commission is constrained to conclude that the Respondent's actions in this matter were not conducted in good faith, and the imposition of a significant penalty is appropriate.

ORDER

ACCORDINGLY, IT IS ORDERED BY THE COMMISSION that Peter Schneckenburger, III be and is hereby found to have violated Sections 1111 C(2)(d) and Section 1113 A as outlined above in Charges I and II, and accordingly he is fined and is ordered to pay the sum of

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\$2000 to the Treasurer of the State of Louisiana, the Honorable Mary Evelyn Parker, within 30 days.

s/Robert C. Snyder
Robert C. Snyder,
Chairman

s/Victor Bussie
Victor Bussie,
Member

s/Eward T.L. Borrie¹
Edward T.L. Borrie
Member

s/Miller D. Dial
Miller D. Dial
Member

s/Thomas W. Barham
Thomas W. Barham
Member

¹ Commissioner Borrie dissents from the imposition of the fine.